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No. 98-625

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In The

Supreme Court of the United States

October Term, 1998

JAMES P. BRADY, STEVEN O. RICHARDSON, JACK L. ADSIT a/k/a COMMITTEE OF SPONSORS OF CONGRESSIONAL TERM LIMITS REFORM 1996, and JEREMY A.C. WEISSEL, STEPHANIE M. JACOBS, and DEWEY C. HERNANDEZ,

Petitioners,

v.

DIANA J. OHMAN, SECRETARY OF STATE FOR THE STATE OF WYOMING,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does WYO. CONST. art. 3, § 52(f) of the Wyoming Constitution violate the First Amendment of the United States Constitution where its terms require a favorable vote of a majority of all people voting in the election in order to enact an initiative or repeal an existing law?

LIST OF ALL PARTIES TO THE PROCEEDING

a. Respondent

Diana Ohman, Secretary of State, State of Wyoming

b. Petitioners

James P. Brady, Steven O. Richardson, Jack L. Adsit, a/k/a Committee of Sponsors of Congressional Term Limits Reform 1996 and Jeremy A.C. Weissel, Stephanie M. Jacobs and Dewey C. Hernandez

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS BELOW BY COURTS AND ADMINISTRATIVE AGENCIES

a. Order and Judgment of the United States Court of Appeals for the Tenth Circuit; unpublished, *Brady, et al. v. Ohman*, 153 F. 3d 726, 1998 WL 438789 (10th Cir. Wyo. 1998)

b. Order and Judgment of the United States District Court for the District of Wyoming; unpublished, *James P. Brady et al. v. Ohman*, No. 97-CV-016-D (D. Wyo. July 9, 1997).

STATEMENT OF JURISDICTIONAL BASIS

28 U.S.C. § 1254(1) provides that cases in the courts of appeals may be reviewed by the Supreme Court where a writ of certiorari is granted. The Tenth Circuit Court of Appeals entered its Order and Judgment on July 15, 1998.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

WYO. CONST. art. 3, § 52(f)

If votes in an amount in excess of fifty percent (50%) of those voting in the general election are cast in favor of adoption of an initiated measure, the measure is enacted. If votes in an amount in excess of fifty percent (50%) of those voted in the general election are cast in favor of rejection of an act referred, it is rejected. The secretary of

state shall certify the election returns. An initiated law becomes effective ninety (90) days after certification, is not subject to veto, and may not be repealed by the legislature within two (2) years of its effective date. It may be amended at any time. An act rejected by referendum is void thirty (30) days after certification. Additional procedures for the initiative and referendum may be prescribed by law.

STATEMENT OF THE CASE

Respondents adopt the Petitioners' Procedural History and Basis of Jurisdiction, and the Petitioners' Appendix.

a. FACTS

The original Plaintiffs supported both an initiative and a referendum which appeared on the 1996 general election ballot in Wyoming. The initiative and the referendum each garnered a majority of the favorable votes cast on each proposition but not a majority of all the votes cast in the general election. As a result both measures failed under WYO. CONST. art. 3, § 52(f). The count of favorable votes did not reach a majority of all the votes cast in the election. There was a count of "yes" votes and a count of the total votes case in the election. These two figures were then compared, as is required by WYO. CONST. art. 3, § 52(f). Petitioners claim that this method "compels" them to speak in violation of the First Amendment.

ARGUMENT

There is no cogent authority cited for the Petitioners' assertion that counting the total number of votes, for comparison and determination of passage, is "casting" a vote for the abstainer. On the contrary, this method for calculating the passage of an item has been found constitutional by the Wyoming Supreme Court in *State ex rel. White v. Hathaway*, 478 P.2d 56 (Wyo. 1970). The State of Wyoming has a compelling state interest in assuring that an initiative or referendum is supported by more than a majority of those casting a vote on the particular initiative or referendum issue and has created a constitutionally sound method for assuring that the initiative should be passed. Such "supermajority" methods have been found constitutional. *Gordon v. Lance*, 403 U.S. 1, 91 S.Ct. 1889, 29 L.Ed.2d 273 (1971).

Section 52(f) does not take away the right to *not* vote. Voters can choose not to vote. If they choose not to vote on a particular issue there is a consequence to that decision that is created by law. That consequence, in the context of passage of an initiative, is this: by not voting one leaves it to other voters *and to the mechanism prescribed by the Wyoming Constitution* to determine the outcome that flows from exercising that choice. Section 52(f) contains absolutely no language about characterizing abstentions as a "yes" or a "no" or even a "maybe." It simply details that the affirmative votes be compared against the total number of votes cast in the election. "Yes" votes are counted and a comparison is then made after the total count is determined. Once the total is determined, the Secretary of State's office determines the number for the threshold amount to constitute a majority of the total

votes cast. That number settles whether the issue is passed or not passed. That is exactly what happened in this case.

The egregious example given by Petitioners in their Petition for Certorari as follows:

> "If 100,000 people vote in a general election, and only 50,000 people actually vote on the proposed measure by marking 'Yes' on the ballot, the measure still fails because the 50,000 voters who abstained from voting on the measure are deemed by Wyoming as having voted 'No.'"

This is a misstatement of fact. There is no "deeming" of any vote. There is no ascription of a nonvoting ballot on this issue as being a "no" vote or an "abstention" vote. There is a tally of the "Yes" votes, the "No" votes and a tally of the total number of votes. To state that a tally or count of abstentions is made simply misstates the facts so that Petitioners can make a First Amendment argument. Quite simply, there is no tally of "abstention" votes. There is no deeming of a vote and there can be no "compelling" of speech therefore.

Petitioners assert that the act of abstention, of acquiescence, would become a "voice" in defiance of the very position that they rail against. Clearly, where there is no act by state government there can be nothing which compels speech. The act of acquiescence in voting on a particular issue, the act of abstaining for whatever reason is a voluntary act on the part of the voter. There is no voice given to that act. To say that logical consequences which flow from an act of acquiescence "compels" speech is a conceptual leap, at minimum, and the argument of the Petitioners must fail as a result. The trial court agreed.

The 10th Circuit Court of Appeals did, as well. This is not an argument that should be given credence by a grant of Certiorari.

CONCLUSION

The decision of the Tenth Circuit Court of Appeals, affirming the Judgment of the District Court, should stand. The Petition for Certorari should be denied.

Respectfully submitted,

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